UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NARRAGANSETT INDIAN TRIBE, ACTING BY AND THROUGH THE NARRAGANSETT INDIAN TRIBAL HISTORIC PRESERVATION OFFICE

Plaintiff,

v. C.A. No.:20-576 (RC)

BRANDYE L. HENDRICKSON in her Official capacity as Deputy Administrator of the FEDERAL HIGHWAY ADMINISTRATION,

and

STATE OF RHODE ISLAND AND AGENCIES, INCLUDING THE RHODE ISLAND DEPARTMENT OF TRANSPORTATION

and

CLAIRE RICHARDS, Individually (Executive Counsel at the Rhode Island Office of the Governor)

Defendants,

STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants State of Rhode Island ("State"), Rhode Island Department of Transportation ("RIDOT"), and Claire Richards, individually and in her official capacity, (collectively, "State Defendants") move to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1), (2),

(3), (4), (5), and (6).[1] This Court lacks personal jurisdiction over the State Defendants, none of whom are located or have contacts in the District of Columbia. Likewise, the venue is improper. Moreover, Plaintiff Narragansett Indian Tribe, acting by and through the Narragansett Indian Tribal Historic Preservation Office ("Plaintiff" or "Tribe" or "NIT"), failed to effectuate proper service on the State Defendants pursuant to Fed. R. Civ. P. 4. Although the lawsuit against the State Defendants should be dismissed based on these threshold issues, Plaintiffs' Amended Complaint also fails to state a claim and is barred by the Eleventh Amendment, the statute of limitations, and res judicata. As such, even if this or another Court had jurisdiction over this case, there are numerous additional reasons why the Amended Complaint simply fails as a matter of law and should be dismissed as to the State Defendants.

BACKGROUND

A. Plaintiff's Latest Complaint Against the State Defendants

Plaintiff implored the Rhode Island District Court where the Tribe originally commenced this action to transfer this case to the District of Columbia based on the Tribe's representation that this case pertains to an administrative decision of the Federal Highway Association ("FHWA"). After getting its way, Plaintiff is now belatedly attempting to bring the Rhode Island State Defendants into this action and force them to litigate in a forum in which they have no ties and re-defend a case that the United States Court of Appeals for the First Circuit already decided in the State's favor. Plaintiff's maneuver is barred as a matter of law for multiple reasons and, more fundamentally, is inefficient and unfair.

[1] State Defendants appear to contest this Court's jurisdiction and, for the sake of efficiency and completeness, also assert various reasons why the allegations against them in the Amended Complaint fail to state a claim. In filing this Motion to Dismiss, Defendants expressly do not waive their threshold arguments that this Court lacks jurisdiction over them, that this venue is improper, and that service was insufficient.

The Amended Complaint asserts an Administrative Procedures Act, 5 U.S.C. § 702, ("APA") claim against the FHWA, alleging that the FHWA made an arbitrary and capricious decision related to the termination of a programmatic agreement ("PA") entered into between the FHWA and the Tribe pursuant to the regulations of the National Historic Preservation Act ("NHPA"). ECF 43 ¶ 1.

More specifically, the Amended Complaint pleads that the "FHWA has provided substantial funding for the replacement of the I-95 Providence Viaduct Bridge No. 578 project in Providence, Rhode Island (the Viaduct Project), including funding under Title 23 of the United States Code." *Id.* ¶ 14.[2] The Tribe pleads that the FHWA determined that the Viaduct Project would have adverse effects on the "Providence Covelands Archaeological District," to which the Tribe attaches cultural significance. *Id.* ¶¶ 17, 18. Accordingly, the FHWA developed a PA among itself and the Tribe, the RIDOT, and the Rhode Island State Historic Preservation Office ("RISHPO"). *Id.* ¶ 19. Those parties entered into a PA "effective October 3, 2011, to govern the implementation of the Viaduct Project and to take into account the foreseen and unforeseen future effects of the Viaduct Project on historic properties." *Id.* ¶ 21. "Pursuant to the PA, FHWA, in coordination with RIDOT, agreed, *inter alia*, to certain stipulations requiring the acquisition and transfer of land to Plaintiff, which stipulations were amended on January 17, 2013 in Amendment No. 1 to the PA." *Id.* ¶ 22.

Pursuant to the PA, "FHWA in coordination with RIDOT" was required to acquire and transfer certain properties to the Tribe. *Id.* ¶ 23. Ownership of certain of the properties was to be

[2] For purposes of this Motion to Dismiss, the State Defendants will generally accept the factual allegations pled in the Amended Complaint, including the Tribe's general characterization of the PA and the circumstances leading up to its termination, but expressly reserve the right to dispute any such allegations in later filings and proceedings if necessary.

transferred to the Tribe with "[a]ppropriate covenants that preserve the property and its cultural resources in perpetuity[.]" *Id.* ¶ 25. According to the Amended Complaint, Rhode Island would not transfer the properties to the Tribe "unless the Tribe specifically waived its sovereign immunity with respect to those two properties and entered into a covenant to subject the properties to the civil and criminal laws and jurisdiction of the State of Rhode Island." *Id.* ¶ 32. Since the property transfer could not be accomplished without the Tribe agreeing that the transferred property would be subject to the civil and criminal laws of Rhode Island, and since the Tribe refused to do so, FHWA terminated the PA on January 19, 2017. *Id.* ¶ 39.

On March 31, 2017, the Tribe initiated a lawsuit in Rhode Island federal court against the FHWA, RIDOT, and RISHPO. The Tribe sought both a declaration that the PA remained in effect and a court order directing RIDOT to transfer the properties to the Tribe in accordance with the Tribe's interpretation of the agreement, without any condition that the properties would be subject to Rhode Island civil and criminal law. As will be discussed further *infra*, on September 11, 2017, the Rhode Island federal court dismissed the Tribe's lawsuit and the United States Court of Appeals for First Circuit subsequently affirmed the dismissal on August 30, 2018. *See Narragansett Indian Tribe by & through Narragansett Indian Tribal Historic Pres. Office ("NIT") v. Rhode Island Dep't of Transportation*, No. CV 17-125 WES, 2017 WL 4011149, at *1 (D.R.I. Sept. 11, 2017), aff'd, 903 F.3d 26 (1st Cir. 2018).

According to Plaintiff, on June 28, 2018, the FHWA "determined that it would 'reinitiate Section 106 consultation for the project and draft a new PA committing to the below mitigation items.'" ECF 43 ¶ 43. The "new mitigation items identified by FHWA were as follows: (a) transfer of the Salt Pond Archaeological Preserve as contemplated by the PA; and (b) in lieu of the land transfers of the Providence Boys Club – Camp Davis and Chief Sachem Night Hawk

properties, implementation of an 'academic-level historic context document about the Tribe; Section 106 training provided to the Tribe; a video documentary about the Tribe; and a teaching curriculum for Rhode Island public schools about the Tribe.'" *Id.* ¶ 44.

In this latest lawsuit, the Tribe contends that the "June 28, 2018 determination by FHWA constitutes final agency action from FHWA regarding the termination of the PA." *Id.* ¶ 45. The Tribe further contends that that "final action of FHWA has resulted in a complete failure to address and mitigate the adverse effects of the Viaduct Project, including the destruction of the site that has resulted from completion of the southbound lane of the Viaduct Project." *Id.* ¶ 46. The Plaintiff seeks declaratory and injunctive relief, along with $30 million in damages and attorneys' fees.

The Tribe first brought this instant lawsuit in Rhode Island federal court on March 29, 2019, naming only FHWA as a defendant. *See* ECF 1. Faced with a motion to dismiss filed by FHWA, the Tribe moved to transfer the case to the District of Columbia. *See* ECF 12, 14. As discussed further *infra*, the Tribe vigorously argued that this case should be transferred out of Rhode Island based on the Tribe's representation that this case pertains to an administrative decision of a *federal* agency. *See* ECF 14, 17. Although the Rhode Island District Court initially denied the Motion to Transfer, the Tribe moved for reconsideration and the Rhode Island Court granted Plaintiff's request. On February 27, 2020, the case was transferred from Rhode Island District Court to this Court. Now that this APA lawsuit against the FHWA has been removed from Rhode Island to the D.C. District Court, the Tribe is trying to add the Rhode Island State Defendants into this action.

On December 21, 2020, after this case had been transferred from Rhode Island to the District of Columbia at Plaintiff's request, the Tribe filed the Amended Complaint naming the

State Defendants. Even though Plaintiff is bringing this case pursuant to the APA, and even though the action seeks judicial review of a "final agency action from FHWA," *id.* ¶¶ 44, 45, Plaintiff suggests the State Defendants can somehow be held liable for millions of dollars in damages on the vague theory that they "share responsibility for the failure to follow Federal law." *Id.* ¶ 1. The Tribe also vaguely pleads that Claire Richards, "individually" and in her capacity as legal counsel to the Governor of Rhode Island "terminated the PA in violation of the Plaintiff's 14th amendment rights under the U.S. Constitution, thereby acting without state authority." *Id.* ¶ 9. The Amended Complaint focuses on the FHWA's June 28, 2018 administrative decision and does not identify any actions on the part of the State Defendants that are the subject of this lawsuit, except to recount that the State required that any property transferred pursuant to the PA would be subject to State law, and the PA was subsequently terminated on January 19, 2017 when the Tribe refused.

B. The First Circuit Dismissed Plaintiff's Prior Complaint Against the State of Rhode Island Based on These Same Facts

As noted above, this is not the first time the Tribe has filed a lawsuit against the State related to the State's position that any property that would have been transferred to the Tribe pursuant to the now-terminated PA would have been subject to the civil and criminal laws of Rhode Island. In 2018, the United States Court of Appeals for the First Circuit affirmed the dismissal of the Tribe's prior lawsuit against the State over the PA. *NIT v. Rhode Island Dep't of Transportation*, 903 F.3d 26, 30 (1st Cir. 2018). In that prior iteration of Plaintiff's complaint, the Tribe alleged that RIDOT had breached a contract by allegedly not complying with the PA, and sought "an injunction enforcing the agreement wrapped in a declaration that the agreement is enforceable." *Id.* at 30. The Tribe's complaint invoked three statutory grounds as causes of action: the Declaratory Judgment Act, 28 U.S.C. § 2201, the Administrative Procedure Act, 5

U.S.C. § 701 et seq., and the NHPA. *Id.* at 28-29. The Rhode Island District Court dismissed Plaintiff's complaint after determining that "the APA provides no cause of action against state agencies and that the Declaratory Judgment Act does not itself confer federal subject matter jurisdiction." *Id.* at 29. Additionally, the District Court concluded that "the NHPA provides no private right of action, as it solely regulates federal agencies." *Id.*

The First Circuit affirmed the dismissal of the Tribe's case. The First Circuit held that "[a]s for the claims against the state agencies, we agree that the complaint lacks any basis for federal subject matter jurisdiction." *Id.* at 30. Specifically, the First Circuit concluded that "[t]he APA provides no federal footing for a cause of action against state actors." *Id.* at 31 (citing *Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 64 (1st Cir. 2016)). Additionally, the First Circuit determined, "[n]or does the Declaratory Judgment Act confer subject matter jurisdiction; the nature of the underlying dispute must provide the basis for the claim to be heard in federal court." *Id.* (citing *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 534 (1st Cir. 1995)). Regarding the final statutory basis for the Tribe's Complaint, the First Circuit concluded that "the claim against the state agencies has no substantive basis in any of the NHPA's dictates." *Id.* The First Circuit noted that "[t]he NHPA is a procedural statute directed at federal agencies; it provides no toehold to seek redress against a state agency, as it requires nothing of state actors except in limited circumstances not applicable here." *Id.* The Court observed that "the Tribe asserts that RIDOT breached a duty it assumed only through the agreement entered into as a way for the Federal Highway Administration to meet its statutory obligation to 'take into account' the effect of the I-95 project on the historic site. 54 U.S.C. § 306108. There is no claim that the state defendants violated the NHPA." *Id.* (emphasis in original). As such, the First Circuit affirmed the dismissal of the Tribe's lawsuit against the State. The Tribe is now once again trying to bring

an APA claim against the State based on the termination of the PA, even though the First Circuit already expressly determined that the Tribe could not do so.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure tests subject matter jurisdiction, which is this Court's "statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 89 (1998). "[T]he plaintiff bears the burden of establishing, by a preponderance of the evidence, that the court has jurisdiction." *Cause of Action Inst. v. Internal Revenue Serv.*, 390 F. Supp. 3d 84, 91 (D.D.C. 2019) (quoting *Whiteru v. Wash. Metro. Area Transit Auth.*, 258 F. Supp. 3d 175, 182 (D.D.C. 2017)). "When ruling on a Rule 12(b)(1) motion, the court must 'treat the complaint's factual allegations as true' and afford the plaintiff 'the benefit of all inferences that can be derived from the facts alleged'; however, factual allegations receive 'closer scrutiny' in the 12(b)(1) context than in the 12(b)(6) context." *Id.* (quoting *Delta Air Lines, Inc. v. Exp.–Imp. Bank of U.S.*, 85 F. Supp. 3d 250, 259 (D.D.C. 2015)).

Under Fed. R. Civ. P. 12(b)(2), "[w]hen personal jurisdiction is challenged, the plaintiff bears the burden of establishing a factual basis for asserting personal jurisdiction over a defendant." *Fiorentine v. Sarton Puerto Rico, LLC*, No. CV 19-3424 (CKK), 2020 WL 5095486, at *2 (D.D.C. Aug. 29, 2020) (citing *Crane v. N.Y. Zoological Soc'y*, 894 F.2d 454, 456 (D.C. Cir. 1990)). To satisfy that burden, the Plaintiff "cannot rely on bare allegations or conclusory statements but 'must allege specific acts connecting [the] defendant with the forum.'" *Id.* (quoting *Second Amendment Found. v. United States Conf. of Mayors*, 274 F.3d 521, 524 (D.C. Cir. 2001)). "And unlike a motion to dismiss for failure to state a claim, the Court need not confine itself to only the allegations in the complaint, but may consider materials outside the pleadings in deciding

whether to grant a motion to dismiss for lack of jurisdiction." *Id.* (quoting *Frost v. Catholic Univ. of Am.*, 960 F. Supp. 2d 226, 231 (D.D.C. 2013)).

"In considering a Rule 12(b)(3) motion, the court accepts the plaintiff's well-pled factual allegations regarding venue as true, draws all reasonable inferences from those allegations in the plaintiff's favor, and resolves any factual conflicts in the plaintiff's favor." *Williams v. GEICO Corp.*, 792 F. Supp. 2d 58, 62 (D.D.C. 2011) (quoting *Pendleton v. Mukasey*, 552 F.Supp.2d 14, 17 (D.D.C.2008)). "The court need not, however, accept the plaintiff's legal conclusions as true, and may consider material outside of the pleadings." *Id.* (internal citations omitted). "Because it is the plaintiff's obligation to institute the action in a permissible forum, the plaintiff usually bears the burden of establishing that venue is proper." *Id.* (quoting *Freeman v. Fallin*, 254 F.Supp.2d 52, 56 (D.D.C.2003); 15 Charles Alan Wright et al., Federal Practice and Procedure § 3826, at 258 (2d ed. 1986 & Supp.2006)). "Unless there are pertinent factual disputes to resolve, a challenge to venue presents a pure question of law." *Id.*

"Federal Rule of Civil Procedure 12(b)(5) governs motions to dismiss for insufficient service of process." *Jouanny v. Embassy of France in the United States*, 220 F. Supp. 3d 34, 37-38 (D.D.C. 2016). "The plaintiff bears the burden of proving that she has effected proper service." *Id.* (citing *Hilska v. Jones*, 217 F.R.D. 16, 20 (D.D.C. 2003)). "To do so, [s]he must demonstrate that the procedure employed satisfied the requirements of the relevant portions of Rule 4 [which governs summonses] and any other applicable provision of law." *Id.* (citing *Light v. Wolf*, 816 F.2d 746, 751 (D.C. Cir. 1987)).

A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a complaint" under that standard; it asks whether the plaintiff has properly stated a claim. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). To survive a motion to dismiss for failure to state a claim upon

which relief may be granted, a complaint must contain sufficient factual matter, accepted as true to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of cause of action will not do." *Id*. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

"Res judicata may be raised in a Rule 12(b)(6) motion to dismiss for failure to state a claim when the defense appears on the face of the complaint and any materials of which the court may take judicial notice." *Jenson v. Huerta*, 828 F. Supp. 2d 174, 179 (D.D.C. 2011) (quoting *Sheppard v. District of Columbia*, 791 F.Supp.2d 1, 5 n.3 (D.D.C.2011)). "The court may take judicial notice of public records from other court proceedings." *Id.* (quoting *Lewis v. Drug Enforcement Admin*., 777 F.Supp.2d 151, 159 (D.D.C.2011)).

ARGUMENT

First and foremost, the claims against the State Defendants must be dismissed because this Court lacks jurisdiction to proceed. The State Defendants do not have contacts with the forum that would provide this Court with personal jurisdiction over them. Additionally, venue is improper and the State Defendants were not properly served pursuant to Fed. R. Civ. P. 4. Although these jurisdictional arguments must be considered first as a threshold matter and should be dispositive, Plaintiff's lawsuit against the State Defendants also fails as a matter of law for multiple reasons, including because it fails to state a claim and is barred by the Eleventh Amendment, the statute of limitations, and res judicata. The gravamen of the Amended Complaint is an administrative appeal of a June 28, 2018 *federal* agency decision, which does not state a cause of action against the State Defendants. The only allegations pled against the State

Defendants — that the State required that any land transferred to the Tribe pursuant to the PA would be subject to Rhode Island law and that the PA was subsequently terminated on January 19, 2017 — are irrelevant to the instant appeal of FHWA's June 2018 administrative decision, do not present a valid cause of action, and were already the subject matter of a prior lawsuit that the First Circuit decided in the State's favor.

A. <u>This Court Lacks Personal Jurisdiction Over the State Defendants</u>

A recent D.C. District Court decision succinctly summarized how a Court must have either general or personal jurisdiction over a defendant in order to proceed:

> A court may possess either "general" or "specific" personal jurisdiction over a party. *Bristol-Myers Squibb Co. v. Super. Court of Calif., San Francisco Cty*., 137 S. Ct. 1773, 1780 (2017). "General" jurisdiction, . . . arises in a jurisdiction "in which the corporation is fairly regarded as at home." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). "A court with general jurisdiction may hear *any claim* against that defendant, even if all the incidents underlying the claim occurred in a different State." *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (emphasis in original). "Specific jurisdiction, [however,] is very different." *Id.* "*In order for a state court to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum*." *Id.* (internal quotation marks omitted). "For this reason, 'specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Id.* (quoting *Goodyear Dunlop*, 564 U.S. at 919).

Fiorentine, 2020 WL 5095486, at *3 (emphasis added) (portions of internal citations omitted).

Here, the State Defendants consist of the State of Rhode Island, the department of Rhode Island's State government pertaining to transportation, and a Rhode Island state employee who is legal counsel to the Governor of Rhode Island. It is beyond peradventure that there is no general personal jurisdiction over these State Defendants. None of these State Defendants reside in the District of Columbia and there is no basis for concluding that the District of Columbia is "home" for any office, department, or employee of the state of Rhode Island, who by their very nature are based in Rhode Island. *See* Exhibit A (Richards Affidavit). There are absolutely no facts pled to

the contrary.

Moreover, this Court does not have specific personal jurisdiction over any of the State Defendants. Establishing specific personal jurisdiction "requires determining both that (i) jurisdiction is permissible under the forum state's long-arm statute, and (ii) the exercise of personal jurisdiction comports with the Due Process Clause." *Urquhart-Bradley v. Mobley*, 964 F.3d 36, 44 (D.C. Cir. 2020).

The District of Columbia's long-arm statute, D.C. Code § 13-423, enumerates certain conditions under which specific personal jurisdiction may be exercised. *See Adler v. Loyd*, No. 1:20-CV-00048 (TNM), 2020 WL 6060302, at *3 (D.D.C. Oct. 14, 2020) ("The District of Columbia's long-arm statute enumerates the circumstances under which courts in the District can exercise specific personal jurisdiction.") (citing D.C. Code § 13-423). For instance, it permits jurisdiction when the defendant has an interest in real property in the District of Columbia, or has caused tortious injury in the District of Columbia by acts or omissions that took place there. *See* D.C. Code § 13-423.

In addition to satisfying one of the enumerated grounds listed in the District of Columbia's long-arm statute, exercising personal jurisdiction over a defendant must also be consistent with due process. "A court's exercise of personal jurisdiction over a defendant satisfies due process if there are 'minimum contacts' between the defendant and the forum such that the defendant 'should reasonably anticipate being haled into court there[.]'" *Urquhart-Bradley*, 964 F.3d at 44 (quoting *Thompson Hine, LLP v. Taieb*, 734 F.3d 1187, 1189 (D.C. Cir. 2013)). In other words, there "must exist 'a relationship among the defendant, the forum, and the litigation' such that 'the defendant's suit-related conduct * * * create[s] a substantial connection with the forum.'" *Id.* (quoting *Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1036 (D.C. Cir. 2020)). These contacts must be

sufficient to establish "that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Adler*, 2020 WL 6060302, at *3 (quoting *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1347 (D.C. Cir. 2000)).

Here, Plaintiff cannot satisfy both prongs of the personal jurisdiction analysis as to any State Defendant, and any assertion there is specific personal jurisdiction simply fails. Significantly, "D.C's long-arm statute does not apply to states." *West v. Holder*, 60 F. Supp. 3d 190, 194 (D.D.C. 2014), aff'd sub nom. *West v. Lynch*, 845 F.3d 1228 (D.C. Cir. 2017) (explaining that states and state officials sued in their official capacities are not included in the definition of "person" set forth in D.C.'s long-arm statute). As a matter of law then, there cannot be specific personal jurisdiction under the District of Columbia's long-arm statute over the State, RIDOT, or Attorney Richards in her official capacity. *See id.* Moreover, the Amended Complaint does not plead, nor can it, that the State of Rhode Island, the Rhode Island Department of Transportation, or the Rhode Island Governor's Executive Counsel in her official or individual capacity, have the necessary connections with the District of Columbia to implicate any of the grounds enumerated in the District of Columbia's long-arm statute. As an initial matter, it is unclear from the Amended Complaint how there is *any* basis at all to sue Attorney Richards in her individual capacity. But to the extent the Amended Complaint could be said to plead any allegations against Attorney Richards in her individual capacity or against any of the other State Defendants, those allegations concern a Viaduct construction project in Providence, Rhode Island, the potential transfer of land located in Rhode Island to a Tribe located in Rhode Island, and actions purportedly taken by Attorney Richards in her employment with the State of Rhode Island as legal counsel to Rhode Island's Governor. *See* ECF 43 ¶¶ 14, 23-25; *see also* ECF 14, p.1 ("NIT is the only federally recognized Indian tribe *located in the State of Rhode Island*.") (emphasis added). There is not and

cannot be any suggestion in the Amended Complaint that any relevant conduct by any of the State Defendants occurred in the District of Columbia or implicated any basis for jurisdiction contained in the District of Columbia's long-arm statute.

Similarly, there are no minimum contacts that would satisfy due process or make it fair for the State Defendants, including Attorney Richards in her individual capacity, to be haled into court in the District of Columbia. As "the Amended Complaint contains no facts that connect [any State Defendants] to the District," this Court lacks personal jurisdiction over the State Defendants. *Adler*, 2020 WL 6060302, at *3; *see also Canuto v. Alexander*, No. 19-5186, 2020 WL 7351253, at *1 (D.C. Cir. Jan. 30, 2020) (per curiam) (affirming dismissal where party "failed to allege any contacts with the District of Columbia that would justify either general or specific jurisdiction over those appellees").

Furthermore, dismissing the State Defendants, rather than re-transferring the case back to Rhode Island, is the appropriate remedy for this Court's lack of jurisdiction over the State Defendants. *See* 28 U.S.C. § 1631 (permitting Court to transfer case where there is a want of jurisdiction "if it is in the interest of justice"). This Court has "discretion in making a decision to transfer an action or instead to dismiss the action." *Trujillo v. Williams*, 465 F.3d 1210, 1222-23 (10th Cir. 2006). This case presents especially compelling circumstances for this Court to exercise its discretion to dismiss the case against the State Defendants and to find that re-transferring the case to Rhode Island is not in the interests of justice.

It would prejudicial to the Defendants to transfer this case back to Rhode Island. Doing so would force the State Defendants to respond to the Amended Complaint a second time after having already responded to the Amended Complaint in this Court, and after having previously litigated the same facts to conclusion in Rhode Island District Court and the First Circuit in the prior lawsuit.

Additionally, this Court has already made substantive rulings in this case, including denying the FHWA's Motion to Dismiss and setting a schedule for compiling the administrative record and proceeding with regard to the appeal of FHWA's administrative decision. *See* ECF 30; 8/19/20 Text Order (vacated for the time being in light of the filing of the Amended Complaint). The unfairness to the Defendants is magnified given that it was solely Plaintiff who originally chose to file suit in Rhode Island, then moved to transfer the case to this Court (and even moved for reconsideration after the Rhode Island District Court initially denied the Motion to Transfer), and now after obtaining its requested transfer, seeks to force the State Defendants to litigate individual claims in an administrative appeal despite having no ties to the District of Columbia. There are no new facts or developments that would justify the Tribe's conduct; the Tribe knew the relevant circumstances and the role (or lack thereof) of the State Defendants when it initiated its prior lawsuit in March 2017 and this lawsuit in March 2019, and when it filed its Motion to Transfer in August 2019. There is absolutely no justification for the Tribe seeking to belatedly bring the Rhode Island State Defendants into this action more than a year and a half after the Complaint was filed and roughly a year after the Tribe successfully lobbied to have the case transferred out of Rhode Island.

Additionally, transferring the case to Rhode Island because of the inclusion of the State Defendants would be futile and inefficient given that Plaintiff's claims against the State Defendants fail as a matter of law for the reasons set forth *infra*. *See Young v. United States*, 88 Fed. Cl. 283, 292 (2009) ("If a claim is determined to be frivolous, it is not in the interest of justice to transfer the case to another court."). If this case were transferred back to Rhode Island because of want of personal jurisdiction in the District of Columbia, the State Defendants would immediately file a Motion to Dismiss in Rhode Island based on the various reasons the Amended

Complaint fails to state a claim against the State Defendants as discussed in this memorandum. If the Rhode Island District Court granted the State Defendants' Motion to Dismiss, which State Defendants believe would be highly likely, the FHWA would revert to being the only defendant in the case. This would present the likelihood of Plaintiff seeking to re-transfer the case back to the District of Columbia and Plaintiff's game of jurisdictional ping pong continuing.

In requesting this case be transferred to the District of Columbia, Plaintiff strenuously argued that the District of Columbia is the proper venue for its lawsuit against the FHWA. *See* ECF 14, 17. Plaintiff stressed that this action pertains to the decision-making and conduct of a federal agency and events involving FHWA that occurred in the District of Columbia. *See* ECF 14, p.4 ("the majority of the actions that took place and led to the Final Decision were made from FHWA's headquarters in Washington D.C."); p.4 ("this case represents a challenge to FHWA's compliance with the National Historic Preservation Act"); *see also* ECF 17 p. 3 ("This action challenges the administrative actions of the FHWA."). Plaintiff further argued that the District of Columbia District Court is particularly well-suited to resolve the matters presented by this case related to the APA and involving federal agencies. *See* ECF 14 p.4 n.3 ("The impact to undertakings is not limited to undertakings by the FHWA. Rather, it is any and all undertakings by federal agencies. . . . The effects of this decision are much greater on the federal agencies located within Washington D.C."); p. 5 ("This matter, dealing with the APA and administrative law, is the type of issue that the 'D.C. Circuit is as familiar, if not more so, than the First Circuit, and which do not materially involve familiarity with the parties.'" (quoting *Mashpee Wampanoag Tribe v. Zinke*, C.A. No. 18-2242 (RMC), 2019 U.S. Dist. LEXIS 104109 *23 (D.D.C. June 21, 2019))). In short, Plaintiff has identified numerous reasons why it believes its case against FHWA should be litigated in the District of Columbia. *See* ECF 14, p.5 ("the Tribe's preference for venue

is the District of Columbia"); p.5 ("It is appropriate for the District of Columbia to be the forum to decide this important national issue.").

Dismissing the State Defendants now would avoid the prospect of multiple court re-transfers and would allow Plaintiff to litigate the chief claim presented in the Amended Complaint — its APA action against the FHWA — in the forum that Plaintiff vigorously argued was best suited to hear that claim. Dismissing the State Defendants rather than transferring the case would not prejudice Plaintiff because the Tribe's lawsuit is clearly focused on the conduct of the FHWA and its case against the State Defendants patently lacks merit. This is a situation solely of Plaintiff's making and the Rhode Island District Court already granted Plaintiff significant latitude in indulging its motion to reconsider and transferring the case to this Court as Plaintiff requested. Dismissing the State Defendants rather than re-transferring the case is efficient, permits Plaintiff to litigate in its preferred forum, and is eminently reasonable and just. *See Indep. Producers Grp. v. Library of Cong.*, 759 F.3d 100, 108–09 (D.C. Cir. 2014) (dismissing rather than transferring case where, "interest [of justice] would be distinctly ill-served by keeping this litigation alive for yet another round").

B. Venue is Improper

Whether venue is improper is generally governed by 28 U.S.C. §1391. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 56 (2013). That statute provides that a "civil action may be brought in" one of three places:

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. §1391. "When venue is challenged, the court must determine whether the case falls within one of the three categories set forth in 1391(b) or within some other specific venue grant." *Atl. Marine Const. Co.*, 571 U.S. at 56. "If it does, venue is proper; if it does not, venue is improper, and the case must be dismissed or transferred under § 1406(a)." *Id.*

Here, the District of Columbia does not satisfy any of the three categories enumerated in the statute that would make this a proper venue with regard to Plaintiff's claims against the State Defendants. Regarding the first category, the State Defendants are not residents of the District of Columbia. Regarding the second category, Rhode Island is the epicenter of this case with regard to any matters involving the State Defendants. The Viaduct Project that led to the PA occurred in Rhode Island and the land that was to be transferred to the Tribe under the PA is located in Rhode Island. *See* ECF 14, p.4 (Plaintiff acknowledges "the actual undertaking, i.e. the Viaduct Project, is located within Rhode Island"). Additionally, the State Defendants are all located in Rhode Island and do not have contacts with the District of Columbia. To the extent the State Defendants engaged in any alleged conduct or events related to this action, it occurred in Rhode Island. Finally, the third category for venue is inapplicable because it appears there is another district in which this action could have been brought, namely Rhode Island. However, Plaintiff intentionally moved to have the matter transferred out of that jurisdiction. Plaintiff has the burden to demonstrate that venue is proper and there are no facts pled in the Amended Complaint to support venue in the District of Columbia with regard to any claims against the State Defendants.

For the reasons discussed in Section A, *supra*, it is in the interests of justice for this Court to exercise its discretion and dismiss this action against the State Defendants based on improper venue rather than re-transferring the case to Rhode Island, which would be inefficient, futile, and unfair. *See supra* p.14-17; *see also Williams*, 792 F. Supp. 2d at 64 ("The decision whether to

dismiss or transfer 'in the interest of justice' is committed to the sound discretion of the district court.").

C. <u>The State Defendants Were Not Properly Served</u>

"Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant." *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). "In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant." *Id.* "[U]nless the procedural requirements for effective service of process are satisfied, a court lacks authority to exercise personal jurisdiction over the defendant." *Jouanny*, 220 F. Supp. 3d at 38 (quoting *Candido v. District of Columbia*, 242 F.R.D. 151, 160 (D.D.C. 2007)). "Failure to effect proper service is thus a 'fatal' jurisdictional defect, and is grounds for dismissal." *Id.* (citing *Tom Sawyer Prods., Inc. v. Progressive Partners Achieving Solutions, Inc.*, 550 F.Supp.2d 23, 26 (D.D.C. 2008)).

Plaintiff's service of the State Defendants did not comply with the legal requirements of Fed. R. Civ. P. 4.[3] In pertinent part, Rule 4(k) specifies the territorial rules for effective service:

> (1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
>
> (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
>
> (B) who is a party joined under Rule 14 or 19 and is served within a

[3] As one federal court explained, a failure to properly serve parties can implicate both Rule 12(b)(4) and (b)(5). "Motions authorized by Rules 12(b)(4) and 12(b)(5) permit a defendant to challenge departures from the proper procedure for service as well as the contents of a summons." *Patel-Julson v. Paul Smith Las Vegas, Inc.*, No. 2:12-CV-01023-MMD, 2013 WL 1752897, at *1 (D. Nev. Apr. 23, 2013). "A Rule 12(b)(4) motion challenges noncompliance with the provisions of Rule 4(b) or any applicable provision incorporated by Rule 4(b) that deals specifically with the content of a summons. A Rule 12(b)(5) motion challenges the mode or method of service of the summons and complaint." *Id.* (internal citations omitted). In this case, it seems that Plaintiff's failure most closely implicates Rule 12(b)(5), but Defendants cite both rules in an abundance of cautions since "[t]he difference between Rule 12(b)(4) and 12(b)(5) is not always clear." *Id.*

> judicial district of the United States and not more than 100 miles from where the summons was issued; or
> (C) when authorized by a federal statute.

Here, none of the three enumerated means of achieving effective service were satisfied. With regard to (1)(A), the State Defendants are not "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located" for the reasons set forth in Section A, *supra*, pertaining to the District of Columbia's lack of personal jurisdiction over the State Defendants. With regard to (1)(C), Plaintiff does not identify any federal statute that would authorize the service of the State Defendants, and none is apparent. With regard to (1)(B), it does not appear that there was a motion for joinder and even if the State Defendants could be considered parties joined under Rule 19, they were not served "not more than 100 miles from where the summons was issued." The summonses were issued in the District of Columbia, but the State Defendants were served in Rhode Island. *See* Exhibit B. This Court can take judicial notice that no part of Rhode Island is within 100 miles from this Court where the summonses issued.

Although the State Defendants accepted service, including to avoid any risk of Plaintiff moving for default, they expressly asserted and preserved all arguments and defenses, including lack of jurisdiction. *See* Exhibit B. It would be extremely prejudicial to require the State Defendants to litigate in this Court in response to a summons that was served in a manner that did not comply with Rule 4(k). The requirements of Rule 4(k) are not mere technicalities. *See Williams*, 792 F. Supp. 2d at 65 ("Proper service of process 'is not some mindless technicality.' . . . Valid service of process is necessary to assert personal jurisdiction over a defendant." (quoting *Friedman v. Estate of Presser*, 929 F.2d 1151, 1156 (6th Cir.1991))). Rule 4(k) ensures that parties can only be summoned to a Court and forced to litigate there when they are sufficiently connected to the forum, either because they are subject to the forum state's jurisdiction or located nearby

within 100 miles of the court, or where some other federal law permits it. Here, the service was patently improper and is not susceptible to being cured because the reasons the service was improper overlap with the reasons this Court fundamentally lacks personal jurisdiction over the State Defendants. This failure provides yet another grounds for this Court to conclude that it does not have jurisdiction over the State Defendants and to dismiss them from this action.

D. The Claims Against the State Defendants Fail as a Matter of Law

Although there are threshold jurisdictional barriers that prevent this Court from deciding the merits of Plaintiff's lawsuit against the State Defendants, the allegations against the State Defendants in the Amended Complaint also fail to state a claim as a matter of law. FHWA previously filed a Motion to Dismiss the Tribe's original complaint based on collateral estoppel and other arguments. *See* ECF 12. In opposing that motion, the Tribe emphasized that this current lawsuit is an APA action seeking judicial review of the FHWA's June 28, 2018 final administrative decision. *See* ECF 18, p. 1 (NIT "brings this [APA] action to challenge the final agency action of the [FHWA] as it relates to the termination of a Section 106 Programmatic Agreement and the decision to affirm its termination and re-initiate Section 106 consultation"). The Tribe specifically emphasized that its lawsuit does not pertain to the termination of the PA in January 2017, but only to FHWA's June 28, 2018 decision regarding re-initiating Section 106 consultation and proposing new mitigation measures. *See* ECF 18, p. 10 ("the Tribe is challenging the June 28, 2018 final decision of the FHWA . . . the January 2017 termination and the June 28, 2018 final decision are two different events"); *id.* ("the Tribe is challenging the June 28, 2018 final decision of the FHWA . . . The June 28, 2018 final decision could not have been challenged in the Tribe's earlier suit, as that earlier suit was filed prior to issuance of the of the [sic] FHWA's final decision."). Although the Plaintiff added the State Defendants to the Amended Complaint,

the thrust of the allegations remain focused on seeking judicial review of the *federal* agency's June 28, 2018 administrative decision under the APA.

The Amended Complaint's allegations against the State Defendants are sparse and unclear. The central focus of the Amended Complaint is an APA claim against the FHWA based on its June 28, 2018 "final decision" to "reinitiate Section 106 consultation, while simultaneously dictating new mitigation items." *See* ECF 43 ¶¶ 1, 43-45, 50. As best the State Defendants can tell, it appears Plaintiff is also bringing an APA claim against the State Defendants on the vague theory that the State Defendants somehow "share responsibility for the [FHWA's] failure to follow Federal law." *See* ECF 43 ¶ 1. The only allegation against the State Defendants in the Amended Complaint is that the State previously determined that any transfer of land to the Tribe pursuant to the PA would be conditioned on the Tribe agreeing that the property is subject to Rhode Island's civil and criminal laws. *See* ECF 43 ¶ 32. But according to the Amended Complaint, an impasse was reached and the PA was terminated on January 19, 2017. ECF 43 ¶ 39. Roughly two months after that January 19, 2017 termination, the Tribe brought — and subsequently lost — a lawsuit against the State based on the State's requirement that any transferred land be subject to Rhode Island law. *See NIT*, 903 F.3d 26. The Amended Complaint does not identify any subsequent conduct by the State Defendants that is the basis of this new lawsuit; nor does it identify how any actions by the State Defendants have any bearing on Plaintiff's request for judicial review of FHWA's June 28, 2018 administrative decision under the APA.

Besides an APA claim (Count I), the Amended Complaint also vaguely asserts that Defendant Claire Richards violated the Fourteenth Amendment (Count II) "by her actions to terminate without cause the PA, that was drafted and negotiated and agreed to by the RIDOT. Her

decision to terminate unless the Tribe disavowed it [sic] status as a Federally Recognized Indian Tribe and waive sovereign immunity was in violation of Federal Law, and as such was unauthorized state action." *Id.* ¶ 56. However, the Amended Complaint does not identify the "Federal Law" it claims was violated or provide any explanation of how the Fourteenth Amendment was supposedly violated. The Tribe does not identify any statutory ground that would permit it to seek millions of dollars in damages and other relief from the State Defendants, especially where this subject was already litigated in the First Circuit and the Tribe lost.

There are a number of dispositive legal grounds for finding that the Amended Complaint fails to state a claim against the State Defendants. These grounds include that the APA and Fourteenth Amendment do not provide a viable cause of action for the Tribe's claims against the state actors and do not waive the State's Eleventh Amendment immunity, and that this action is barred by the statute of limitations, as well as issue and claim preclusion. State Defendants will address these issues in turn.

1. The Amended Complaint Fails to Plead a Viable Cause of Action Under Federal Law or to Overcome the State's Eleventh Amendment Immunity

There are two legal grounds identified in the Amended Complaint as the basis for the Plaintiff's claims: the APA (Count I) and the Fourteenth Amendment (which is pled in Count II, apparently only against Attorney Richards). Neither provides a valid cause of action against the State Defendants.

It is well-settled as a matter of law that the APA does not provide a cause of action against state actors. *See Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 64 (1st Cir. 2016) ("even assuming that the Town properly pled an APA action, the APA only provides for review of federal agency action (and then only under some circumstances). . . . It does not provide a right of action against a state agency."); *Johnson v. Rodriguez*, 943 F.2d 104, 109 n.4 (1st Cir. 1991) ("The

[APA] statute is wholly inapposite. By its terms, the APA governs decisions by 'each authority of the Government of the United States.' 5 U.S.C. § 701(b)(1). It does not purport to affect the review processes of state agencies or commissions."); *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1048 (9th Cir.1979) (APA does not create private cause of action against a municipal agency, not part of the federal government), cert. denied, 445 U.S. 961 (1980); *Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1055 (5th Cir. 1993) ("we identified the 'APA as a route through which private plaintiffs can obtain federal court review of the decisions of *federal* agencies.' (emphasis added). We emphasized that the right of review under section 702 does not give district courts the 'jurisdiction to enjoin such nonfederal entities'" (quoting *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453 (5th Cir.1989), cert. denied, 493 U.S. 1020 (1990))); *see also* 5 U.S.C. § 701 (APA applies to "each authority of the Government of the United States"). The First Circuit already expressly held that the Tribe could not bring a claim against the State actors based on the APA when it dismissed the Tribe's prior attempt to invoke the APA in an action against the State related to the termination of the PA. *See NIT*, 903 F.3d at 31 ("[t]he APA provides no federal footing for a cause of action against state actors").[4]

Even assuming Plaintiff could bring an APA claim against the State Defendants, there are no factual allegations to support the claim. The only particular final administrative agency decision identified in the Amended Complaint is the June 28, 2018 decision that was made by a

[4] As discussed further *infra* with regard to the State Defendants' assertion of claim preclusion, the principle that an APA claim cannot be brought against state actors is best characterized as requiring dismissal for failure to state a claim under 12(b)(6) rather than for lack of subject matter jurisdiction under 12(b)(1). However, regardless of whether the Tribe cannot bring an APA claim against the State because the cause of action fails to state a claim or because there is a lack of subject matter jurisdiction, the bottom line is that either way, as a matter of law, the Tribe cannot bring an APA claim against state actors as it is seeking to do now.

federal entity. *See* ECF 43 ¶ 45 ("The June 28, 2018 determination by FHWA constitutes final agency action from FHWA[.]"); 5 U.S.C. § 706. The Amended Complaint does not identify any legal basis for bringing an APA claim against one entity based on the administrative decision of another entity, and there is none. Any argument involving the State Defendants is misplaced. Moreover, to the extent Plaintiff seeks millions of dollars in damages, money damages are unavailable under the APA. *See McKoy v. Spencer*, 271 F. Supp. 3d 25, 34 (D.D.C. 2017) ("Because these remedies constitute money damages, the Court cannot entertain Plaintiffs' request for them under the APA's waiver of sovereign immunity.").

The only remaining claim against any State Defendants is a Fourteenth Amendment claim against Attorney Richards, seemingly in her individual and official capacities. ECF 43, Count II. Count II, sub-titled "Violation of Plaintiff's 14th amendment protections and rights under Federal law," pleads that Attorney Richards' "decision to terminate [the PA] unless the Tribe disavowed it [sic] status as a Federally Recognized Indian Tribe and waive sovereign immunity was in violation of Federal Law." ECF 43, Count II. However, the Amended Complaint does not provide notice regarding how the Fourteenth Amendment was supposedly violated or identify any other "Federal Law" Plaintiff contends was violated. "[T]he complaint does not include facts that would give rise to a plausible inference that the plaintiff has suffered the deprivation of a protected right." *Sutz v. Powers*, No. 1:20-CV-01096 (UNA), 2020 WL 2112057, at *2 (D.D.C. Apr. 30, 2020) (dismissing Fourteenth Amendment claim for failure to state a claim). Neither does the Amended Complaint identify any federal law that would waive the State's Eleventh Amendment immunity, permit an action for damages, or provide a basis for suing a State employee in her individual capacity for alleged counsel she gave in her role as legal counsel to the Governor.

"The Eleventh Amendment renders the States immune from . . . unconsented suits brought

by a State's own citizens," as well as from suits "commenced or prosecuted . . . by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Tennessee v. Lane*, 541 U.S. 509, 518 (2004). Although the Supreme Court has recognized that "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment," Plaintiff has not identified any statute evidencing such an exercise of Congressional power relevant to this case. *Id.* (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). As such, Plaintiff's Fourteenth Amendment claim is a nullity because Plaintiff fails to identify any basis for waiving the State's Eleventh Amendment immunity to suit, and also fails to identify how the State's requirement that Rhode Island law apply to land that would have been transferred to the Tribe under the PA had the agreement not been terminated years ago violated any rights protected by the Fourteenth Amendment or any other "Federal Law." This claim is without merit.

2. The Statute of Limitations Bars Plaintiff's Claim

As noted above, the only conduct by the State Defendants identified in the Amended Complaint is the State taking the position that any land that would have been transferred to the Tribe pursuant to the since-terminated PA would be subject to the civil and criminal laws of Rhode Island. Plaintiff contends the PA was terminated on January 19, 2017 as a result of the State taking that position. *See* ECF 43 ¶ 39. Plaintiff does not identify any conduct by the State Defendants after January 19, 2017 that is the basis for its claims against the State Defendants.

As discussed above, the Amended Complaint does not clearly identify any valid federal cause of action against the State Defendants. Nonetheless, federal law generally requires courts considering constitutional claims to borrow the state's personal injury statute of limitations when federal law does not supply a statute of limitations. *See Owens v. Okure*, 488 U.S. 235, 236

(1989). Rhode Island law clearly applies a three-year statute of limitations to suits against the State. *See* R.I. Gen. Laws § 9-1-25; § 9-31-1. Plaintiff has not identified any conduct on the part of the State Defendants that is the basis for its claims and that occurred within three years of the State Defendants being named in this action, which was in December 2020. This provides yet another grounds for this case to be dismissed.

3. Issue and Claim Preclusion Bar Plaintiff's Action Against the State Defendants

"The doctrine of res judicata prevents repetitious litigation involving the same causes of action or the same issues." *Jenson v. Huerta*, 828 F. Supp. 2d 174, 179 (D.D.C. 2011) (citing *I.A.M. Nat'l Pension Fund, Benefit Plan A v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 946 (D.C.Cir.1983)). "Whether two cases implicate the same cause of action turns on whether they share the same nucleus of facts." *Id.* (quoting *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir.2002)). "To determine whether two cases share the same nucleus of facts, courts consider 'whether the facts are related in time, space, origin, or motivation[;] whether they form a convenient trial unit[;] and whether their treatment as a unit conforms to the parties' expectations.'" *Id.* (quoting *Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 78 (D.C.Cir.1997)). "The doctrine has two components: claim preclusion and issue preclusion." *Id.*

Here, both issue and claim preclusion apply. Issue preclusion applies because the First Circuit already decided one of the very same issues that is presented by the Tribe's current lawsuit, namely whether the Tribe can assert a cause of action based on the APA against the State actors. The First Circuit resolved that issue by ruling that the Tribe could not do so. That prior resolution of the issue bars the Tribe from asking this Court to re-decide that same issue. Additionally, claim preclusion also applies because the factual allegations that are the basis for both lawsuits against the State are the same, namely that the State required that any land

transferred pursuant to the PA would be subject to State law and the PA was subsequently terminated as a result. [5] The Amended Complaint does not reference any conduct by the State Defendants other than what occurred prior to (and was the subject of) the First Circuit decision. As such, any claims that the Tribe brought *or could have brought* in the prior suit related to those facts are barred. Since the entirety of Plaintiff's instant lawsuit against the State Defendants pertains to that precluded subject matter, this entire lawsuit against the State Defendants is barred. Having described generally how both issue and claim preclusion apply to bar Plaintiff's instant lawsuit, the State Defendants will now delve deeper into the specific analysis behind applying both types of preclusion.

"Under the doctrine of issue preclusion, 'binding effect [is to be given] to the first resolution of an issue.'" *Consol. Edison Co. of New York v. Bodman*, 449 F.3d 1254, 1257-58 (D.C. Cir. 2006) (quoting *Fogg v. Ashcroft*, 254 F.3d 103, 110 (D.C.Cir.2001)). Issue preclusion "is intended to protect the parties from the burden of relitigating the same issue following a final judgment and to promote judicial economy by preventing needless litigation." *Id.* (quoting *Freeman United Coal Mining Co. v. Office of Workers' Comp. Program*, 20 F.3d 289, 294 (7th Cir.1994)). "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Id.* (quoting *Freeman*, 20 F.3d at 294). Applying issue preclusion requires three elements: "[1], the same issue now being raised must have been contested by the parties and submitted for judicial determination

[5] As discussed above, the focus of the instant lawsuit is challenging a June 28, 2018 administrative decision of the FHWA. However, as also noted above, the only allegations in the Amended Complaint regarding the State Defendants pertain to the alleged conduct of the state actors leading up to the January 19, 2017 termination of the PA, which is the same conduct that was the subject of the First Circuit decision.

in the prior case[; 2], the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case [; and] [3], preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007).

In the instant litigation, the Tribe is bringing a claim based on the APA against the State Defendants. In *NIT*, the First Circuit expressly determined that the Tribe could not bring any claim against the State of Rhode Island, including any state actors, based on the APA. *See* 903 F.3d at 31 ("[t]he APA provides no federal footing for a cause of action against state actors"). As such, the same issue now presented by the Tribe's latest lawsuit against the State Defendants — whether the Tribe can bring a claim against Rhode Island state actors based on the APA — was already litigated by the parties. This issue was contested and presented for judicial determination as evidenced by the First Circuit's ruling against the Tribe on this precise issue. The issue was necessarily determined because it was a critical component of the First Circuit determining that the case needed to be dismissed because none of the three statutory grounds invoked in the Tribe's complaint provided a basis for a valid federal claim against the State.

Moreover, applying preclusion does not work any unfairness on the Tribe. The Tribe was the plaintiff in the prior action and had every opportunity to fully and completely litigate the issue. It is the State Defendants who would be prejudiced by being forced to re-litigate an issue that the State already litigated and on which it prevailed. Permitting Plaintiff such a second bite at the apple would burden the State Defendants, erode finality, and encourage forum shopping. As such, the Tribe's latest attempt to assert the APA as a basis for suing the State Defendants in connection with the PA is foreclosed by the First Circuit's prior determination that the Tribe cannot do so.[6]

[6] In denying FHWA's Motion to Dismiss, this Court rejected FHWA's assertion of collateral

In addition to issue preclusion, claim preclusion is also applicable based on the prior lawsuit by the Tribe. "Under claim preclusion, 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been* raised in that action.'" *Jenson*, 828 F. Supp. 2d at 179 (quoting *Sheppard v. District of Columbia*, 791 F.Supp.2d 1, 4-5 (D.D.C.2011)) (emphasis added). "A judgment on the merits is one that 'reaches and determines the real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction[,] or form.'" *Id.* (quoting *Sheppard*, 791 F.Supp.2d at 4-5). "A privy is one so identified in interest with a party to the former litigation that he or she [or it] represents precisely the same legal right in respect to the subject matter of the case." *Id.* (quoting *Hafezi v. Construction & Dev., Inc.*, No. 04–cv–2198, 2006 WL 1000339, at *6 (D.D.C. Apr. 14, 2006)). "Claim preclusion bars not only claims actually raised in the first action but also claims arising out of the same transaction that could have been raised in the original action." *Advantage Health Plan, Inc. v. Knight*, 139 F. Supp. 2d 108, 110 (D.D.C. 2001).

The First Circuit's *NIT* decision already dealt with the same nucleus of facts and subject matter as this action with regard to the State Defendants, namely the Providence Viaduct Project and the termination of the PA in light of the State's requirement that any property transferred to the Tribe under the PA would be subject to Rhode Island law. *See NIT*, 903 F.3d at 28 (describing how according to the complaint, the lawsuit resulted because "the state insisted that the Tribe waive any claim of sovereign immunity on those lands and agree that Rhode Island civil and

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estoppel. This Court noted that with regard to FHWA, the First Circuit "dismissed the Tribe's complaint because it found there was no final agency action and thus no waiver of sovereign immunity," but that now the Tribe is asserting that there has been a final agency action that it is contesting. ECF 30, p. 10 n.2. By contrast, with regard to the State Defendants, the issue resolved by the First Circuit is the same as the issue currently before this Court, namely whether the APA can provide a legal basis for the Tribe to pursue a federal claim against the state actors.

criminal laws apply. The Tribe refused. After unsuccessful efforts to resolve the dispute in accordance with the terms of the agreement, the Federal Highway Administration and RIDOT terminated the agreement in its entirety.").

The Amended Complaint does not identify any actions by the State Defendants other than those that were the subject matter of the prior lawsuit. The "two cases share the same nucleus of facts," "are related in time, space, origin, or motivation," and "form a convenient trial unit"; treating them as a unit "conforms to the parties' expectations." *Jenson*, 828 F. Supp. 2d at 179 (quoting *Stanton*, 127 F.3d at 78). Plaintiff may now be asserting an APA lawsuit against the FHWA based on its subsequent June 28, 2018 administrative decision, but the factual allegations related to the state actors are the same as the ones already considered by the First Circuit. To the extent the Tribe contends that this conduct by the State violated the Fourteenth Amendment or any other law, Plaintiff *could have* and *should have* included that claim in its prior lawsuit.

Both that prior legal action and this one also involve the same parties or their privies. The Tribe was the Plaintiff in both cases and RIDOT was the Defendant in both cases. The State of Rhode Island and Attorney Richards, who is named because she is legal counsel to the Governor of Rhode Island and according to Plaintiff, was the one who decided to terminate the PA, *see* ECF 43 ¶¶ 9, 56, are clearly in privity with RIDOT and represent "precisely the same legal right in respect to the subject matter of the case." *Jenson*, 828 F. Supp. 2d at 179; *Advantage Health Plan, Inc.*, 139 F. Supp. 2d at 110 (determining that a principal and an agent were in privity when the lawsuit pertained to a matter where defendants were sued for actions taken when acting as agents within the agency relationship).

The final issue to consider for claim preclusion to apply is whether the First Circuit decision constituted a final judgment on the merits. "A judgment on the merits is one that 'reaches

and determines the real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction or form.'" *McIntyre v. Fulwood*, 892 F. Supp. 2d 209, 215 (D.D.C. 2012) (quoting *Sheppard*, 791 F.Supp.2d at 5). The First Circuit affirmed the dismissal of the Tribe's lawsuit, which definitively terminated that lawsuit. A decision on a motion to dismiss under Rule "12(b)(6) presents a ruling on the merits with res judicata effect." *Id.* (quoting *Haase v. Sessions*, 835 F.2d 902, 906 (D.C.Cir.1987)). The Rhode Island District Court decision, which was affirmed by the First Circuit, expressly dismissed for failure to state a claim under Rule 12(b)(6).

In dismissing the Tribe's lawsuit against the State, the District Court stated that "despite some murkiness in the law as to whether dismissal based on the absence of a private right of action should be for failure to state a claim or lack of jurisdiction, I am confident that such a claim is properly disposed of by way of a Rule 12(b)(6) motion." *NIT*, 2017 WL 4011149, at *4 n.27 (citing *Arroyo-Torres v. Ponce Fed. Bank, F.B.S.*, 918 F.2d 276, 280 (1st Cir. 1990)). The District Court noted that the State's Motion to Dismiss was based on Rule 12(b)(6) and the Court ultimately concluded that "Plaintiff *fails to state a claim upon which relief can be granted* such that State Defendants' Motion To Dismiss is hereby GRANTED." *Id.* at *5 (emphasis added). The First Circuit affirmed the District Court's decision. *NIT*, 903 F.3d at 32.

In its affirmance, the First Circuit did not determine that federal courts do not have subject matter jurisdiction over APA claims, but rather that the Tribe's particular APA-based claim against the state actors was not viable. Likewise, the Court did not determine that the other statutes invoked by the Tribe (the Declaratory Judgment Act and the NHPA) did not implicate federal court jurisdiction, but only that the particular claims pled by the Tribe failed to state a federal law claim.

"[W]here a plaintiff asserts that a private right of action is implied from federal law, federal courts do have the requisite subject matter jurisdiction to determine whether such a federal remedy exists." *Arroyo-Torres*, 918 F.2d at 280 (quoting *Till v. Unifirst Federal Sav. & Loan Ass'n*., 653 F.2d 152, 155 n. 2 (5th Cir.1981)); *see also Burks v. Lasker*, 441 U.S. 471, 476 n. 5 (1979) ("The question whether a [private] cause of action exists is not a question of jurisdiction...."); *Evansville, Ind. v. Kentucky Liquid Recycling*, 604 F.2d 1008, 1011 n. 4 (7th Cir.1979) (same). In *Arroyo-Torres,* the First Circuit considered whether federal law provided a basis for the plaintiff's claim and determined it did not. *Arroyo-Torres*, 918 F.2d at 280. In that case, the Court rejected the notion that the Court lacked subject matter jurisdiction and instead determined that "the complaint should have been dismissed for failure to state a claim under Rule 12(b)(6)." *Id.*; *see also Burks v. Lasker*, 441 U.S. 471, 476 n. 5 (1979) ("The question whether a [private] cause of action exists is not a question of jurisdiction. . . ."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("[i]t is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case").

Here, the Rhode Island District Court and First Circuit analyzed the three federal statutes cited by Plaintiff and interpreted each of those statutes to determine whether or not they provided a valid private cause of action for Plaintiff's claim, and concluded they did not. As such, the First Circuit's decision is best read as a final decision on the merits that precludes the Tribe from attempting to re-litigate not just those issues that were actually decided in the First Circuit case, but also any other claims that *could have* been brought based on those facts. This result is eminently equitable. Where, as here, Plaintiff had "'one fair and full opportunity to prove a claim and [has] failed in that effort,' they may not re-litigate the claim a second time." *Consol. Edison*

Co. of New York, 449 F.3d at 1260 (quoting *Blonder–Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 324-25 (1971)).

CONCLUSION

The Court should dismiss the State Defendants from this action.

Respectfully submitted,

DEFENDANTS,
STATE OF RHODE ISLAND,
RHODE ISLAND DEPARTMENT
OF TRANSPORTATION, and
CLAIRE RICHARDS, Individually
and in Her Official Capacity as
Executive Counsel at the Rhode
Island Office of the Governor

By:

PETER F. NERONHA
ATTORNEY GENERAL

/s /*Katherine Connolly Sadeck*

Katherine Connolly Sadeck, RI Bar No. 8637
Special Assistant Attorney General

150 South Main Street
Providence, RI 02903
Tel: (401) 274-4400, Ext. 2480
Fax: (401) 222-3016
KSadeck@riag.ri.gov

CERTIFICATE OF SERVICE

I certify that on January 26, 2021, I caused a copy of the foregoing Motion to Dismiss to be filed electronically and that this document is available for viewing and downloading from the ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Katherine Connolly Sadeck